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Supreme Court, U.S.
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No. 98-1526

In The

Supreme Court of the United States

WOLFGANG SCHUG, M.D.,

Petitioner,

vs.

DAVID BURROWS, successor-in-interest to Cody Burrows, deceased; DAVID BURROWS and RHODA THOMAS individually and as heirs and surviving parents of Cody Burrows,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER WOLFGANG SCHUG, M.D.'S REPLY TO RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO BOTH PETITIONS FOR WRITS OF CERTIORARI

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I. Respondents Concede That The Question of A Federally Recognized Peer Review Privilege Is Important And A Source Of Conflict Among The Federal Courts.

Petitioner Wolfgang Schug, M.D. has been joined by the medical profession, the hospital industry, the national accrediting body for hospitals and health organizations, and liability carriers for these industries in asking this Court to review the issue of whether a medical peer review privilege exists in federal courts. Respondents concede that the question of a federally recognized peer review privilege is both important[1] and a source of conflict in the federal courts.[2] Inasmuch as the presentation of a question of national importance and a conflict in the law are the touchstones for review (*see, e.g., Jaffee v. Redmond*, 518 U.S. 1, 7-8 (1996)), certiorari should be granted in this case.

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[1] Respondents state that the questions presented in the petition "might otherwise be interesting questions of privilege law" and are "of *potentially* significant legal interest." (Respondents' Brief, p. 1) (italics in original).

[2] Respondents concede there is an "apparent division of authority" in the federal court system over the medical peer review privilege. (Respondents' Brief, p. 11). Indeed, Respondents posit that the law is in such conflict that the District Court's discovery order could not have possibly been an abuse of discretion. (Respondents' Brief, p. 8). Respondents' position is that no district court in the United States could be wrong on this issue, no matter how it rules, because the law is in such disarray. The Court might wish, instead, to draw the conclusion from this argument that federal courts need Supreme Court guidance on the issue of a medical peer review privilege.

II. This Case Is Now Appropriate For Supreme Court Review.

Despite Respondents' concerns about the interlocutory posture of this case, arising as it does from a discovery order, the issues raised herein merit *immediate* review. **Indeed, the issue of California's peer review privilege can be reviewed only at the discovery stage because "[b]y its terms, Evidence Code section 1157 creates only a privilege against discovery from medical staff committees; it does not create a bar against introduction of evidence."** *Alexander v. Superior Court*, 5 Cal.4th 1218, 1223 n.4, 859 P.2d 96, 23 Cal.Rptr.2d 397 (1993). Therefore, the issue of medical peer review privilege would not come up at trial and could only arise in a discovery setting under Evidence Code § 1157. In general, questions of privilege arise in the discovery phase of a case, and this has not previously inhibited Supreme Court review of privilege issues.[3]

This case provides a particularly good vehicle for defining a medical peer review privilege in federal courts. Contrary to Respondents' argument, the District Court's rejection of the state peer review privilege was

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[3] *Cf., University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182 (1990) (peer review privilege invoked in response to E.E.O.C. subpoena); *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985) (attorney-client privilege asserted in response to subpoena duces tecum; certiorari granted to resolve circuit conflict); *Upjohn Co. v. United States*, 449 U.S. 383 (1980) (attorney-client privilege asserted in response to summons issued by Internal Revenue Service).

necessary for the District Court to reach its decision.[4] In its opinion, the District Court did not apply the doctrine of comity, nor did it have access to a clear and consistent body of federal law. Instead, it analogized this fundamentally medical malpractice case to an antitrust or employment discrimination case simply because plaintiffs alleged "spoliation of evidence" – a cause of action which was subsequently abolished by the California Supreme Court.[5]

Some federal courts recognize the peer review privilege in medical malpractice cases (*see, e.g., Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973)), but not in other contexts, *e.g.*, when doctors themselves attack the peer review process. *See Purgess v. Sharrock*, 33 F.3d 134 (2d Cir. 1994); *Memorial Hosp. v. Shadur*, 664 F.2d 1058 (7th Cir. 1981). Not all federal courts, however, draw this distinction. The Supreme Court has yet to offer its opinion on the topic.

A "mixed" case such as this – which is fundamentally a medical malpractice claim, but also involves an allegation that the peer review process itself was tainted – provides a perfect opportunity for the Court to opine whether, and under what circumstances, federal courts

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[4] Petitioner Wolfgang Schug, M.D. has only state claims pending against him. If this Court finds that he should be permitted to enforce the medical peer review privilege under Federal Rule of Evidence 501, then the proper disposition would be to grant his petition and summarily review the decision below.

[5] *Cedars-Sinai Med. Ctr. v. Superior Court (Bowyer)*, 18 Cal. 4th 1, 954 P.2d 511, 74 Cal.Rptr.2d 248 (1998).

should recognize state law peer review privileges and their exceptions, or create a federal medical peer review privilege with exceptions defined by the Court in its Opinion.

The *Perlman*[6] issue deserves certiorari on its own merits. Respondents' brief tries in vain to harmonize the law but cannot.[7] The *Perlman* exception to the one-judgment rule is a critical protection for persons such as Dr. Schug to protect against invasion of their rights by granting direct appeals when a district court has failed to apply a crucial privilege. Whether the hospital is motivated to protect his rights or not, Dr. Schug should be entitled to appeal the ruling against him. He should not be forced to rely on the motivation of a third party to protect the privilege as to him. The rationale of *Perlman* applies with equal force to the facts of this case.

Contrary to Respondents' argument, the issue before the Court is not whether the Ninth Circuit did or did not commit clear error in granting or denying Petitioner's writ of mandate. The Court may grant certiorari following summary denial of a petition for writ of mandate. *E.g., Hetzel v. Prince William County, VA*, 523 U.S. 208 (1998). As Chief Justice Vinson noted 50 years ago: "The

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[6] *Perlman v. United States*, 247 U.S. 7 (1918).

[7] Respondents assert that Dr. Schug's direct appeal has delayed prosecution of this case. Since the filing of Dr. Schug's petition in this Court, however, Respondents have filed a motion in the lower court invoking the pendency of Dr. Schug's current appeal and the stay of mandate to try to set aside recent rulings made by the District Court that are unfavorable to Respondents.

Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions."[8] Rather, the Court, as a matter of judicial discretion, may grant review to answer important questions of federal law or to resolve conflict among the courts of appeal. SUP. CT. R. 10. As Respondents have conceded, those two criteria have been satisfied in this case.

Respectfully submitted,

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[8] Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S. Ct. v, vi.